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Nos. 1479 and 1483

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY - - *Petitioner*,

v.

SOUTH-EAST COAL COMPANY - - - *Respondent*.

NO. 1483

UNITED MINE WORKERS OF AMERICA
- - - - - - - - - - - - - - - *Petitioner*,

v.

SOUTH-EAST COAL COMPANY - - - *Respondent*.

On Petitions for Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

C. GIBSON DOWNING,
Stoll, Keenon & Park,
310 First National Bank Building,
Lexington, Kentucky,

JOHN A. ROWNTREE,
Fowler, Rowntree, Fowler & Robertson,
1412 Hamilton Bank Building,
Knoxville, Tennessee,

Attorneys for Respondent.

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

4-9-71-75

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Petitions correctly state that the opinion of the Sixth Circuit in these two (2) cases is reported in 434 F.2d 767.

JURISDICTIONAL GROUNDS

The Petitions correctly show that this is a Sherman Act case based on 15 U.S.C. Sections 1, 2 and 15, and this Court has jurisdiction under 28 U.S.C. Section 1254(1).

COUNTERSTATEMENT OF THE CASE

A. THE NATURE OF THE ACTION.

Respondent, South-East Coal Company (South-East), a producer and seller of bituminous coal in Eastern Kentucky, brought this case in the United States District Court for the Eastern District of Kentucky, Lexington, against petitioners, United Mine Workers of America (UMW), an international labor union, and Consolidation Coal Company (Consol), the largest producer and seller of bituminous coal in the country, operating in a number of states, its principal office being in Pittsburgh, Pennsylvania. The suit is based on the Sherman and Clayton Acts (15 U.S.C. §§1, 2 and 15).

Briefly, South-East charged that petitioners and the Bituminous Coal Operators Association (BCOA), which was organized by Consol in 1950, and others engaged in an unlawful conspiracy in the period of this case (1962-1966) to eliminate and suppress competition and production of all but the largest companies in the coal industry. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended (NBCWA), including the 1958 Supplement containing the Protective Wage Clause (PWC), and the later supplements which contained the 80¢ Welfare Clause, would be permitted to carry on operations. It was alleged that the smaller companies or companies not operating in ideal working conditions could not operate profitably under the provisions of the National Agreement;

that those who did not sign were not permitted to operate, and were forced out of business; and that plaintiff was damaged as a result of the conspiracy. It was further charged that, pursuant to said conspiracy, Consol boycotted South-East coal and deprived South-East of its customary markets, and UMW induced two long and damaging work stoppages at South-East's mine and cleaning plant.

B. THE TRIAL COURT CHARGED THE JURY THAT DEFENDANTS WERE NOT LIABLE UNLESS IT WAS FOUND THAT DEFENDANTS WERE ENGAGED IN AN INTENTIONALLY PREDATORY CONSPIRACY UNDER WHICH THE NATIONAL CONTRACTING ARRANGEMENT WAS BEING USED FOR THE PURPOSE OF DRIVING THE SMALLER COMPETITORS OUT OF THE INDUSTRY.

The Trial Court in this case repeatedly and clearly charged the jury that the only basis upon which they could return a verdict for the plaintiff and against the defendants was upon a finding that the national contracting arrangement of the defendants was being used for the purpose of driving the smaller competitors out of the industry pursuant to an intentionally predatory conspiracy between them (1838, 1842-3, 1844, 1845-7).* The jury found for the plaintiff under this charge.

C. THE THEORY OF LIABILITY AND THE COURT'S INSTRUCTIONS WERE FOUNDED ON *UNITED MINE WORKERS v. PENNINGTON*, (1965), 381 U.S. 657.

The theory in this case of predatory conspiracy between a union and business groups to drive competitors out of

* Page references, unless otherwise stated, are to the Joint Appendix in the Court of Appeals which has been certified to the Supreme Court.

markets and out of business was founded on *United Mine Workers v. Pennington*, 381 U.S. 657, which, in turn, was based upon *Allen Bradley Company v. Local Union*, 325 U.S. 797. Congress has allowed the *Allen Bradley* decision to stand for 25 years as a much relied upon precedent. This case was tried before the decision of this Court in *Ramsey v. United Mine Workers*, No. 88, October Term 1970.

D. THE FOUR JURIES WHO HAVE CONSIDERED THE ALLEGED PREDATORY CONSPIRACY IN THE COAL INDUSTRY HAVE ALL FOUND THAT THE CONSPIRACY DOES EXIST.

In the four cases in which juries were asked to determine whether the alleged predatory conspiracy actually existed in the coal industry, *all* of the juries have responded in the affirmative. Besides the verdict in this case, there were affirmative verdicts in the "*First Pennington Case*", *Pennington v. United Mine Workers*, 325 F.2d 804, reversed and remanded 381 U.S. 657; *Tennessee Consolidated Coal Company v. United Mine Workers*, 416 F.2d 1192; cert. den., 397 U.S. 964; and in *Blue Diamond Coal Company v. United Mine Workers*, Civil Docket No. 6189, United States District Court for the Eastern District of Tennessee, Northern Division (no appeal).

E. THE TRIAL COURT DID NOT SUBMIT TO THE JURY ANY THEORY OF LIABILITY BASED UPON THE ILLEGALITY OF AN AGREEMENT WITHOUT SPECIFIC PREDATORY INTENT BY THE UNION WITH ONE BARGAINING UNIT TO IMPOSE CERTAIN WAGE TERMS IN OTHER BARGAINING UNITS, WHICH WAS PART OF THE THEORY IN *RAMSEY v. UNITED MINE WORKERS*, NO. 88, OCTOBER

TERM, 1970. THE JURY HERE HAD TO FIND PREDATORY CONSPIRACY BEHIND THE NATIONAL CONTRACTING ARRANGEMENT UNDER THE COURT'S CHARGE.

On December 7, 1970, this Court heard argument in *Ramsey v. United Mine Workers*, No. 88, October Term, 1970, (decided February 24, 1971) on certiorari to the Sixth Circuit, 416 F.2d 655, a case tried by the District Court without a jury. The theory in that case went beyond simply predatory conspiracy to drive competition out of the industry and also included the contention that there was proved an agreement by the union with one bargaining unit to impose certain wage terms in other bargaining units, and that this agreement was illegal, even without specifically proving predatory intent. This additional *Ramsey* theory was not charged to the jury in this case. Rather, the Trial Court confined his charge to the alleged intentionally predatory conspiracy relying on *Pennington* and *Allen Bradley*.

F. THE TRIAL COURT GAVE BOTH DEFENDANTS THE BENEFIT OF A GENEROUS INSTRUCTION UNDER THE "CLEAR PROOF" RULE UNDER SECTION 6 OF THE NORRIS-LaGUARDIA ACT. THE CHARGE WAS MUCH MORE GENEROUS TO BOTH DEFENDANTS THAN WOULD BE JUSTIFIED UNDER THE CONSTRUCTION PLACED ON SECTION 6 BY UMW IN ITS FINAL BRIEF AND ARGUMENT IN THIS COURT IN *RAMSEY* OR BY THE DECISION OF THIS COURT IN *RAMSEY*.

The courts have been confronted with the meaning and scope of the "clear proof" rule under Section 6 of the Norris-LaGuardia Act in this series of coal cases, including *"Second Pennington"*, *Lewis v. Pennington*, 400 F.2d

806, cert. den. 393 U.S. 983; *Tennessee Consolidated Coal Company v. United Mine Workers, supra*; and *Ramsey v. United Mine Workers, supra.* UMW in those cases had argued that "clear proof" must go to final conclusions on every phase of antitrust cases against labor unions such as this. In cases before *Ramsey* the UMW's argument was not aimed primarily at specific language in Section 6, but apparently was more related to the exemption provided unions under antitrust statutes when they act alone, and UMW was the only defendant in previous cases. The UMW urged that when a union was involved as a defendant in an antitrust case a new standard of proof should be fashioned for determining issues of liability. But this court rejected that contention in *Ramsey* saying: "Nor do we discern any basis for ourselves fashioning a new standard of proof applicable in antitrust actions against labor unions." The opinion of the Sixth Circuit in this case points up the soundness of this Court's conclusion in *Ramsey* even in face of any of the previous arguments which go beyond the language of Section 6 of Norris-La-Guardia.

In this case the Trial Court extended to both defendants the most generous charge that could reasonably be argued for under Section 6 or under either the majority or dissenting opinions in *Ramsey*. Section 6 pertains to responsibility for unlawful acts in labor disputes. The unlawful activity charged in this case was predatory conspiracy violating the Sherman Act.

The Court in this case charged " ... such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (1836).

Then the Court finished off his charge leaving the version of clear proof that both defendants wanted strong and fresh in the minds of the jury:

"Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof." (1915).

The foregoing charge certainly extends beyond, and is more generous to both defendants than, what any instruction under Section 6 would be under the construction placed on that section by UMW in its final brief and argument in this Court in *Ramsey*, *supra*. In the latter case UMW had argued that all elements of the conspiracy must be proved by clear proof (as it had successfully argued in *Second Pennington*, *supra*) but after this Court granted certiorari in *Ramsey*, and realizing the error of its previous successful arguments along this line, UMW switched to the contention that Section 6 really was limited to proving authorization, ratification or participation in acts of agents, but that the Trial Court in *Ramsey* had actually so limited the rule.

The charge of the Trial Court in this case certainly goes considerably beyond the last UMW contentions in *Ramsey* and, we submit, satisfies any reasonable construction of the statute. The rule should not be resorted to simply as a snare or escape hatch to confuse courts and be construed in different ways to frustrate the attainment of a just result in such a case as this.

G. COUNTERSTATEMENT OF FACTS

1. The Petitions Have Challenged the Sufficiency of the Evidence and the General Fairness of the Jury Charge. Respondent Must Detail the Facts Sufficiently to Show These Challenges are not Valid.

Consol's petition, at pages 24 and 25, contends the District Court erroneously overruled Consol's post-trial motions based on insufficiency of the evidence and that the District Court's jury charge was generally inadequate and prejudicial.

Such questions as these cannot be adequately answered without giving enough detail in a statement of facts to show the Court the nature of the record upon which such questions are raised. Also the arguments under several of the other questions posed in the petitions are generally aimed at a kind of case that is not reflected in this record.

2. This Brief Contains Only an Abbreviated Outline of the Proof Previously Considered by the Court Including That Which Was Also in *Ramsey v. UMW*. This Brief Concentrates On New Facts in This Case About the Conspiracy and Its Effect on South-East.

This Court has recently considered *Ramsey v. United Mine Workers*, *supra*, which contained a substantial part of the evidence on developments in the coal industry which is also in this record. It would be unduly burdensome to detail that proof in a brief in opposition to petitions.

At the same time, in order to remind the Court of such proof, an abbreviated outline of the same is included in this brief below under heading number 4.

This Brief itself will concentrate on new facts in this record about the conspiracy and its effects on respondent and Eastern Kentucky. South-East was an older and more substantial coal producer than the plaintiffs in previous cases dealing with the alleged conspiracy. Also the president of South-East, Harry LaViers, Sr., had a personal acquaintanceship before the late 1950's with the principal officers of UMW, of Consol, and also with the other leaders in the industry. Before the 1950's, LaViers was one of UMW's good friends according to UMW (638-9, 1426). Also, before 1962 Consol was South-East's biggest customer (401-2). LaViers, before the 1960's, took an active part in various groups of industry leaders (479, 667). As far back as 1940 he was on the boards that administered NRA coal codes and the Guffey Act investigations (476). For these reasons the record in this case contains more evidence of the alleged predatory conspiracy in coal than previous cases.

3. Summary of the Basic Factual Contentions of the Petitioners. Since There Was Evidence From Their Own Records or Witnesses That Strongly Refuted Every Contention Made by Petitioners, It Cannot Be Said That the Jury's Verdict Was Unreasonable.

Petitioners contended that they did not combine, conspire or agree as charged. The prime effort of petitioners at the trial was to make subsidiary factual contentions to counteract the obvious fact that petitioners anticipated and knew, that their long sustained and willful course of conduct would wreck and was wrecking, the businesses not only of South-East but also all the other competitors similarly situated throughout the industry, and also to counteract the proof in this record from minutes of as-

sociations and committees that the UMW's national contracting course of conduct was insisted on by the associations of companies whose purpose was to raise coal prices by attacking competing production through the union (794-836, 881, 1654-64).

UMW contended (1) it adopted its uniform national contracting practice pursuant to policies adopted early in its history favoring uniform wages, and that it made no change in policies in 1950 on the formation of BCOA as claimed by respondent (a contention inconsistent with UMW's own official records as shown in heading number 4 below). UMW further contended (2) respondent never sought any contract from UMW except the "standard" or national contract and merely procrastinated in signing a renewal of that contract until the local unions struck, and (3) that UMW's district officers stood ready and willing to "negotiate item by item" with respondent.

The petitioner, Consol, contended (1) it was no more responsible for the establishment and activities of BCOA and the resulting national contracts than other signature companies; (2) that while it stopped purchasing respondent's coal when respondent cancelled the UMW contract, Consol was not boycotting respondent's coal; that Consol never did pay any attention to the language of the Protective Wage Clause (PWC) of the national contract that called for a boycott of respondent's coal when respondent cancelled and stopped complying with that contract. Also Consol contended (3) it stopped buying respondent's coal because it did not need it since the market for this type coal was on the decline.

Both petitioners contended (1) respondent was equally guilty as the petitioners (pari delicto) since it was a member of Southern Coal Producers Association (SCPA) which

agreed to the national contracts on behalf of its members. And both petitioners contended (2) respondent's troubles stemmed altogether from poor judgment and lack of good management.

There were other lesser contentions made by petitioners but most of their proof was devoted to the foregoing propositions.

With respect to UMW's contention that plaintiff never sought any contract except the UMW "standard" or national contract, this is the testimony of five UMW district and local representatives. But their testimony is directly contrary not only to the testimony of plaintiff, but to the written pleas of plaintiff to UMW's principal officers begging for a more practical and workable contract. Receipt of these written pleas was acknowledged and they are in the record, but it is conceded that there were no responses from UMW (440-1, 452-3, 624-6). "Negotiations" extended over a period of four years and two long, devastating strikes. The UMW international officers did not testify and a substantial part of the "bargaining" efforts of plaintiff was with them (443-5, 461-3, 901-5).

The district and local officers also testified that they stood ready, willing and able to "negotiate item by item" with plaintiff and they made a point of impressing this on the plaintiff and the plaintiff's employees. But they also acknowledge that plaintiff completely revealed its financial records to UMW representatives but these representatives say they never heard or saw anything that "they could recommend to the scale committee that they should accept" (1417). It is also true that UMW answered interrogatories in this case on May 22, 1967, disclosing that no one in UMW could approve contract terms except its international scale committee, on which sat its international

officers, and these authorities have not approved a single change in a single contract with a single producer at variance with the national contract as amended since 1950 (754, 777).

As to Consol's contention that it has no more responsibility for the establishment and later activities and contracts of BCOA than other signature companies, Consol's chief officer, Mr. George Love testified as a "live" witness at the jury trial in this case, "you certainly didn't want your competitors to pay less wages, if you could do anything about it, than you did" (1486), and one thing wrong with the coal industry was there were too many companies (1485). Love was one man in the industry who "could do anything about it."

He talked about forming BCOA in 1949 with Harry Moses (851), and it is stipulated by Consol that BCOA's articles of association empowered George Love to call the first meeting in 1950; that he called that meeting, became the first chairman and then headed the committee that obtained Harry Moses as president, the officers and directors of Consol and of Moses' company (Frick Coke Company of U. S. Steel) having over 50 percent of the voting power in BCOA by reason of representation of participating annual production (860-870). Love or his Consol successor served on the special three-man committees that assisted Moses in negotiating with UMW after that (1341, 1376, 1491-2).

There is one area of sharp conflict in testimony concerning the alleged boycott of plaintiff's coal by Consol. The latter had purchased very substantial quantities of plaintiff's coal for a number of years, but after September, 1959 and before 1962, Consol not only bought the coal but insisted upon being sales agent for all the plaintiff's coal

(401-4). When plaintiff had three years of operating losses it advised Consol in late 1961 that it was going to have to cancel the UMW contract. The plaintiff's testimony is that the Consol representative advised that if this happened Consol could not continue to handle plaintiff's coal (425-6, 431-2, 894). The Consol witness denies this (1567).

But there was the PWC in the national contract at that time—plainly calling for a boycott by Consol if plaintiff did not pay national contract terms (431, 1920). Plaintiff's officers believed the word that Consol would no longer handle the coal, and they believed the contract meant what it said. So they proceeded to start setting up a new sales company, advised Consol of this, gave the required sixty days notice of cancellation of the UMW contract, and cancelled the Consol agency when the new sales company organization was complete (432-5, 680-2).

Virtually no more of plaintiff's coal was purchased by Consol, for the first time in many years dating back to long before the Consol-plaintiff agency relationship had been established (401-3, 437-40).

Now, Consol says it was not applying a boycott even though the then existing national contract called for a boycott and even though it was a heavy stockholder and creditor of plaintiff, and plaintiff tried hard to sell coal to Consol (437-40, 683-6).

Consol says it never did inquire into the wages or union connections of its suppliers and that from the very beginning, when PWC was put in the contract in 1958, Consol never paid any attention to that clause and made no policy change as to dealing in the coal produced by others. Consol witnesses testified that when the PWC was put in the contract the instruction issued in the Consol organization was to make no policy change. Their explanation

was that the Landrum-Griffen "Hot Cargo" provision raised a question of illegality as to the clause (858-9, 1451, 1460, 1473, 1558).

But Landrum-Griffen came almost a year after the PWC was put in the contract and it came after the Joint Industry Contract Committee (JICC) (the policing body under PWC) had made formal findings of violation on the part of over 1300 coal companies for not certifying compliance with PWC, this information being contained in minutes of JICC which South-East was able to locate and put in evidence (794-835).

While Consol was the largest company and had such a part in setting up the machinery that made the contract, the jury obviously could not swallow the Consol contention of never having paid any attention to the language when that language was being strictly applied against over 1300 lesser companies (816-825). The Consol testimony on this point simply was not believed, with full justification, when Consol did refuse to buy any more South-East coal exactly as required by the PWC.

Another explanation Consol furnished for stopping the buying of plaintiff's coal was that the market for this type coal had declined and the small quantities required were readily available from other companies for whom Consol continued to act as agent. Two Consol purchasing officers previously associated with purchases from plaintiff, Messrs. Burke and Durkin, supported this theory (1444, 1470-1). But a later Consol witness, the man most closely associated with the situation, Mr. Thompson, had an entirely different, more detailed and far more believable story on cross-examination. He was a Consol witness and his version on being cross-examined was that Consol's Cleveland office let it be known that there would be no

plaintiff's coal and this came in late 1961 (a time when plaintiff had revealed its intent to go non-union but sometime before it cancelled the Consol agency). Thompson testified that this was a shock to the Consol purchasing organization which needed very substantial quantities of that type coal. After a considerable period of efforts by this witness, with conferences between various Consol offices, and testing of coal and adjustments made at the preparation plant of another company, a replacement was finally made for plaintiff's coal (1642, 1646, 1648-50). So the final Consol excuse that Consol had no need for plaintiff's coal missed its mark with the jury for obvious reasons.

As to the defense of pari delicto, there is little left of this defense in an antitrust suit after the decision of this Court in *Perma-Life Mufflers, Inc. v. International Parts, Inc.*, 392 U.S. 134. Also to show there is no factual basis for that defense we refer to the part of this brief below under heading number 5.

As to the defense that plaintiff was guilty of poor judgment and lack of good management, the "poor judgment" charge stemmed from the agonized decision of plaintiff's officers and stockholders not to abandon operations in Eastern Kentucky as Consol had done when the best mining conditions were exhausted (1537-8); not to liquidate and retire to easy living on the company's fat accumulated surplus when old properties approached exhaustion; but rather to find the best coal property remaining in Eastern Kentucky and stick in the coal business there. Defendants' own counsel on cross-examination, brought out that one aspect of this decision was to help alleviate the extreme economic difficulties and severe unemployment rampant in Eastern Kentucky coal fields (380, 531, 886-7, and see Plaintiff's Exh. 8, 1942).

As to the defense of poor management, defendants' witness, one of the best qualified to know, testified that plaintiff was the most highly efficient and productive producer left in Eastern Kentucky (1403). Plaintiff had done everything possible to get production costs to the bare minimum in its condition (354, 891-2).

The issue of predatory or anticompetitive conspiracy was presented to the jury in the clearest and most understandable words possible by the Trial Court in its charge. The jury found against defendants. Looking at the record as a whole (without "compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" — *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699), it is difficult to see how any jury could come up with a different answer.

4. Brief Summary of the Proof of Agreements and Understandings in the Coal Industry that Was in *Ramsey v. UMW* as Well as in This Record.

To be brief we shall only outline the areas of the proof previously considered by this Court in *Ramsey*.

Contrary to the contentions of petitioners, UMW did not have a consistent wage uniformity policy before the organization of BCOA in 1950. Differentials gave recognition to all segments of the industry in collective bargaining. Uniformity in wages made no substantial gains until the heavy demands for coal of the World War II period. The decline in the coal demand in the post-war period left the alternatives open to UMW (1) to retain a system of substantial differentials in wages, (2) to push through a plan of production control to assure employment for a maximum number of members, as it actually set out to do in 1948 and 1949 in the Bituminous industry and actually did in the

Anthracite industry, or (3) surrendering to the demands of Consol and the major companies to allow no difference in wages throughout the industry with the obvious and necessary effect of wiping out competition and jobs for members (630-1, 852, 1007-11, 1022-6, 1111-3, 1165-76, 1360-1, 1389-92, 1486).

This record shows clearly that the third alternative above was deliberately chosen. It shows why the wage differentials system in coal before the 1940's was fair and promoted maximum jobs and competition and also why the system devised by UMW and BCOA of flat wage increases across the board for every job in the industry after 1950 was unfair and drastically restrained employment and competition. It is established in the record that once a business unit or group seizes control of industry-wide wage policy in an industry like coal, it can regulate all the economics of the industry (357-360, 364-5, 885, 889-890).

In the bargaining conferences before 1950 in which UMW had negotiated terms with the northern conference, the Southern Coal Producers Association and the "captive" mines, there were open meetings with board representation and every segment of the industry found a voice.

The Bituminous Coal Operators Association was formed on July 22, 1950, resulting from discussions between Mr. Harry Moses (of U. S. Steel) and Mr. Love (of Consol) that had commenced in 1949 (761, 850-1).

It was Mr. Love of Consol, who wanted competitors to pay wages no lower than his if he "could do anything about it" (852, 1022-3, 1486). Representing the largest company and being the spokesman for the northern industry in labor matters, he was in a position to do something about it and he proceeded to do it.

Love and his collegues decided they would try to get the negotiations out of the public view and into private sessions. This was a decision of the industry leaders, not the union (1333, 1345-7, 1479-81). According to Mr. Love, this accomplished the big change that did occur in 1950, since after BCOA was established the contracts could be negotiated "quietly" in Washington where the negotiators had their officers (1481).

In fact, to show UMW was not connected with this change UMW's chief counsel, whose testimony was read, stated that there was discussion in the press from industry leaders "that a tsar (sic) in the industry was going to be in the bituminous industry, was going to be selected by the operators and there was all sorts of speculation in reference to it in June of '49 and the union publicly disclaimed connection with this movement" (1270). However, it is true that Lewis had said shortly before: "If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will" (1360-1). And it is true that when BCOA was established UMW did readily enter into "quiet" and private negotiations with BCOA for contracts that did, in fact, cover the entire industry. Also it is true that the chief officers of both BCOA and UMW have welcomed and praised the opportunity to sit down in private session to decide the problems of the whole industry "authoritatively" (776, 1347).

Under BCOA a new bargaining technique was developed. Throughout the 1950's two-man bargaining teams in "quiet" or "mystery" bargaining worked out a series of very substantial, flat, across-the-board wage increases in amendments to the National Bituminous Coal Wage Agreement of 1950, applicable in identical amount for every job in the industry. Consol officers were always on the three-man

committee that prompted the BCOA representative in making these amendments to the National Contract. UMW has not allowed a single change in a single contract with a single coal producer from the printed forms that were worked out in these sessions (763-771, 775, 777, 1275-7, 1481).

Even the third largest coal association (Illinois Coal Operators Association) containing the second largest coal company of the country could not escape from the dictatorship of the BCOA Contracts (1659).

The record shows the dramatic shift in the policy and attitude of UMW after the formation of BCOA. Instead of pursuing its historic policies favoring equal work opportunities for all members and competitive equality, after 1950 UMW considered the smaller units as "just a drag on the industry" and "more of the obsolete units will fall by the board and go out of production" (784-5). UMW acknowledged the contracts were forcing intensive mechanization (788) and UMW favored the taking over of the industry by the combines being formed in the industry (1106).

Under this authoritative UMW-BCOA dictatorship which concededly was forcing intensive mechanization on the industry, the average number of men employed in the industry daily has fallen rapidly. In 1950 there were approximately 416,000 men employed and in 1959 there were approximately 180,000 men. By 1966 the figure was 131,752. This is attributed to mechanization and increased productivity required by the flat wage increases across the board. In 1920 the underground production averaged 3.97 tons per man per day. In 1949 it was still only 5.42 tons. But by 1963 it was 12.78 tons. This does not include surface mining which shows much higher figures. Plaintiff

engaged only in underground production (351-2, 355) (Plaintiff's Exhs. 6 and 7, 1940-1).

Much has been written of the tragedy and despair in the regions (mostly in the Appalachians) tied to the coal industry where the attainment of the highest degree of mechanization was more difficult or impossible.

At the very time when these harsh economic consequences of their actions were taking place, the petitioners were busily engaged in tightening up the screws of their dictatorship so as to remove from these people any ray of hope at all for work or self-support. This brings us to the period of 1958-1959 when BCOA formed a consortium with the next two largest coal associations (the Illinois Coal Operators Association and the Southern Coal Producers Association (SCPA)) and inserted the Protective Wage Clause (PWC) into the December, 1958, amendment to the national contract. The terms of the PWC are in the record at pages 1919-1921.

5. This Record Goes Beyond the *Ramsey* Record. It Establishes That Consol Controlled BCOA, That the Purposes of the Contracting Policy of UMW, BCOA and Other Major Associations Was to Drive Out Competition to Raise Prices, That the Effects Have Been Extreme in Eastern Kentucky, and Harry LaViers of South-East Tried Long and Hard to Change the National Contracting Pattern to Alleviate Distress in the Southern Fields. The Major Companies Would Not Listen.

The Articles of Association of BCOA gave Mr. Love the power to call the first meeting of BCOA. He called that meeting in 1950 and became its first chairman. Under BCOA voting rules the officers and directors of

Consol and of Mr. Moses' company (H. C. Frick Coke Company, division of U. S. Steel) could control any vote (860-6). Love and his Consol successors served on the three-man committee of BCOA that controlled the bargaining (1341, 1376, 1491-2).

As stated above, the effects of BCOA's contracts have been severe in drastic unemployment and economic deterioration in many areas. Of particular concern in this case are the statistics and findings of the United States Department of Labor in 1959 as to the five-county area of Eastern Kentucky wherein this plaintiff, South-East, operated. This has been the hardest hit area in the country and blight and suffering has been indescribable and apparently unescapable (356-360).

The efforts of UMW members in these areas, driven out of jobs as have about two-thirds of the union membership, to find and hold onto work in non-contract coal operations brought on the PWC in 1958 and 1959. The part that the major associations had in getting PWC into the national contract is important in this case.

Of particular interest in SCPA since its territory encompassed Eastern Kentucky and plaintiff was a member of SCPA before 1962. The defendants in this case went to great lengths to tie South-East to responsibility for SCPA actions and to show that Mr. Moody, head of SCPA, was the principal instigator and prime mover (along with Mr. Fox of BCOA) in getting the PWC into the national contract (790-1, 794, 1278-9, 1654-6).

The reasons and purposes for the PWC being put in the contract, according to the report of Mr. Moody to his SCPA Board of Directors in the regular minutes of that Board for the meeting of December 3, 1958, were as follows:

"In the promulgation of this contract over the years, and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields. The law of supply and demand took over and we discovered that the labor price established by the contract was not the price established by the number of miners available for work. This situation encouraged the establishment of mines, not under the union contract. This also presented the union with a problem, as they found men who were members of the United Mine Workers effectively opposing interference with their non-contract operations in order to hold their jobs. Therefore, the union found it was unable to carry out major organizing campaigns. Lastly, the coal market was rather seriously weakened as far as price was concerned, as there was a premium of non-contract, low-priced coal." (1661-4, 1944-5)

Defendants claim plaintiff is equally guilty with them of any antitrust wrongdoing because of its membership in SCPA and the service of Harry LaViers, Sr., on the SCPA Board of Directors. Mr. LaViers, Sr., was president of plaintiff and was a charter member of SCPA in 1941.

SCPA was the second largest association of coal producers. BCOA, and the predecessor group of operators

that made up the Northern Conference that had formerly met with UMW, made up roughly one-half of coal tonnage (761—one line missing, see transcript 1009; 1225). SCPA made up about one-fourth of the tonnage (671, 1009).

SCPA was organized October 17, 1941, after the dispute that year over the elimination of the north-south Appalachian differential (1260). The northern group got the union to put a "most favored nation" clause into its new contract that year, which meant that UMW would be bound to eliminate in the southern contracts the general 40 cents per day wage differential that southern appalachian companies previously had below northern appalachian companies (476-8, 627-31, 1219-1220).

The purpose of SCPA was to join together to combat the application in the southern Appalachian companies of the contracts negotiated by UMW with the northern group (660). But it developed after BCOA that SCPA could get no meaningful audience with UMW, and the UMW-BCOA national contracts were made to apply in the south as elsewhere. SCPA had no effective part in their negotiation. The south had the alternatives of signing or taking a sixty-day notice of contract termination and strike (481, 486-7, 579-80, 657-9).

Mr. LaViers was a charter member of SCPA and explained SCPA on cross-examination as follows:

> "The Southern Coal Producers Association was organized in 1941, when the northern and the United Mine Workers imposed or tried to eliminate—did eliminate the 40-cents differential.
>
> "Since then, it has participated in some national wage negotiations, and after 1950, when the national coal wage agreement was agreed upon by the BCOA

and the United Mine Workers, the Southern Coal Producers Association has had practically nothing to do with any negotiation subsequent to that time.

"It has attempted to have improvements made in the contract, it has tried to add differentials established that would recognize the economic conditions in the various producing areas.

"It has tried to effect other changes in the contract, to clarify it, and to make it what we thought was a more equitable and reasonable contract, and we have had practically no success whatsoever along that line." (579)

As a charter member of SCPA, Mr. LaViers agreed with the purposes of SCPA (660). Being in SCPA he had no part in contract negotiations (343-4). He was not a labor-baiter, nor did he believe in resisting honest union efforts to relieve the distress of the miners who, at one time, were as much in need of a strong union as any group in the country. In fact, defendants made a point in this trial to show that Mr. LaViers was known at one time as one of UMW's best friends and took the position that a contract with the union was a stabilizing influence on the industry (490, 639).

But, the situation that developed under UMW-BCOA in the 1950's was an entirely different thing (490). Mr. LaViers did not think the contract should be rigidly applied to everyone and every type job alike without the right to negotiate changes (557-8). He fought harder than anyone else in the industry in the 1950's, consistent with the original purposes of SCPA, to have a contract with fair and equitable differentials. And he saw clearly then what was eventually to be done to the industry by an iron-bound

uniform national contract (as seen above)—the forcing of large parts of the industry to quit or to go non-union. This was what he preached for years as head of the Labor Committee of the Coal Executives Conference, an organization of leaders of the industry from all sections (666-7).

Mr. LaViers prepared and presented to the Coal Executives Conference in Chicago on May 20, 1954, a resolution which read:

> "A. The present high cost of production of bituminous coal brought about by the existing Labor Agreement has resulted in a loss of more than one-third of the market for commercial coal and has created a competitive condition both within the industry and with competing fuels that is disastrous. The present agreement imposes burdens to which other industries are not subjected.
>
> "B. A fair and equitable labor agreement could contribute an element of stability to the industry and therefore is desirable.
>
> "C. Because certain terms and conditions in the present agreement are burdensome and have provided such a profitable incentive to avoid the said terms and conditions there is a rapidly growing movement toward non-union and semi-union operations with which union commercial mines cannot compete and because if present inequalities and incentives are not adjusted they will inevitably bring further chaos to the industry. Therefore, we recommend that representatives of this organization immediately seek a conference with representatives of our employees in order to eliminate or modify these improper terms and conditions.

"D. We believe that any proposal affecting the labor agreement should be an integral part of an overall 'Plan of Survival' for the industry and should be considered and presented along with proposals on market stabilization, legislation, transportion, etc." (667-8)

Mr. LaViers was unsuccessful in getting this resolution adopted, and he proposed it so many times that "it became a matter of some jest" in the Coal Executives Conference (668).

Mr. LaViers later talked to many union representatives and others in the industry about his concern that there be changes—that the contract be fair and equitable and not so rigid, because it was forcing many companies to abandon any contract, simply not comply or go non-union, resorting to extremely low pay scales with which no union company could compete. He was, in all instances, seeking a change from the rigid contracting pattern because of its effects (557-8, 648-9).

In the late 1950's there came a change in the majority views in SCPA as to purposes and policies. Consol became influential in SCPA in 1957 or 1958 when it purchased Pocahontas Fuel Co. (653). Mr. Matthews was representing Consol in both SCPA and BCOA at the very time when he was on the BCOA special committee directing Fox when the PWC was negotiated (653, 661-2, 876, 1492). By 1960 several of the other stronger companies in SCPA were also members of BCOA (661-2).

We have shown above that Mr. Moody, head of SCPA, was talking with UMW and Illinois Association representatives about a proposed PWC sometime before the PWC of 1958 was proposed to the SCPA meeting of December 3, 1958 (1655). We quoted above what Mr. Moody told the

board members, including Mr. LaViers, about the PWC. There was no revelation to LaViers in this discussion about Mr. Moody's prior contacts as co-initiator and co-drafter of the clause. It was presented to the board as a "fait accompli" about which the SCPA board could do nothing (659, and see Plaintiff's Exh. 10, 1946). Mr. LaViers voted for signing the clause and later went along with sitting Mr. Moody on the Joint Industry Contract Committee, but there was no alternative (659). At that time plaintiff was not purchasing coal and would not have to do any boycotting (383).

But, as shown by his course of conduct, Mr. LaViers did not willingly approve of PWC. It was directly opposite to what he and SCPA had previously made basic policy with respect to the contract. An inflexible contract could not be stabilizing (640, 648-9). He vigorously questioned with SCPA legal counsel the legality of the clause—from the time he first saw it on December 3, 1958, to subsequent trips to Washington when he went to the counsel's office (490-1, 558, 634).

Even after PWC was in full sway and while the JICC of Lewis, Owens, Kennedy, Fox, Moses and Beebe were busily making findings with respect to compliance with the uniform national contract terms on the part of over 1300 companies (as will be hereinafter related), Mr. LaViers was still urging the SCPA to consider and study what could be done about the dismal economic plight of the Eastern Kentucky coal fields, as shown in SCPA minutes (659-60).

Mr. LaViers was finally able to get SCPA to set up an economic committee to study the sorry situation throughout the southern district (664-5). The minutes show that on a sub-committee under this, Mr. LaViers went to see

the international union officers to try to get modifications of the contract to relieve the critical economic situation in the southern fields (567-8, 665). This trip was unsuccessful and the SCPA minutes of November 14, 1960, show the failures of this committee to get anything done, but able only to report recommendations for future efforts, including (1) possible legislative recommendations for stabilizing the industry and (2) possible wage agreement modifications (568-70, 665-6). There was no agreement among the SCPA board members on these things (666).

This committee was able to get nothing done. Mr. LaViers told the board August 4, 1961, he did not think there could be any agreement reached and recommended the committee be dissolved. Shortly thereafter Mr. LaViers and plaintiff resigned from SCPA (666). Sometime later, in 1968, SCPA became a part of BCOA (1264-8).

We have related above how PWC came into the national contract in 1958. Rebellion in its membership ranks was affecting UMW organizing drives and coal prices were being affected by competition of coal mined by the miners displaced by the machinery forced on the organized industry. The effort was to drive this coal out of markets. The PWC is set forth in the appendix (1919-21).

There is no dispute in this case that Lewis and Kennedy of UMW, Fox of BCOA, Moody of SCPA and Beebe of the Illinois Association were working together in drafting the PWC to be inserted in the national contract. These men, plus Mr. Owens, Secretary-Treasurer of UMW later became the members of the joint committee (JICC) that policed the industry in the observance of this clause.

Paragraph D of PWC required UMW districts to report "complete" lists to the JICC of the names of "all" of the operators "whose operations are under contract with the union."

The minutes (794-835) of the JICC, whose members were the men who formulated the language of the clause, show that the districts of UMW were required to send in lists to the JICC certifying that each list was a "complete list of all operators and mines engaged in the production of bituminous coal within District ..., and whose operations are under contract to the said union" (801). These lists were added to from time to time, as new contracts were made.

The JICC sent out demands to all of the companies, without question or regard to what kind of contract they had with UMW, that they send back certification of compliance in the prescribed form (800-1)—that is, that they were paying the national contract scale and welfare royalty and had "complied fully with the other provisions of the said national agreement."

Hundreds of companies did not send back the certifications, and, after a second letter of warning, formal determinations were made and recorded of violation of the Protective Wage Clause on the part of 1328 coal operators across the country, the determination being that every such producer "has violated the Protective Wage Clause" of the 1950 contract as amended, and:

> " ... has failed and refused to comply with it obligation under such clause to certify in writing to the Committee that it is in full compliance with all of the terms and conditions of such agreement." (816-822)

The Landrum-Griffen Act with its "hot cargo" or secondary-boycott provision was passed by Congress in September, 1959. The JICC had been at work several months and was getting its enforcement program into high gear. But the new act cast doubt upon the legality of the boycott contained in Paragraph B of PWC. Because of

this JICC passed a resolution on November 4, 1959, suspending enforcement of the boycott pending clarification of the legal situation (823-5).

Ultimately JICC authorized attorneys to represent the members in any proceedings challenging PWC (Tr. 1350-1), and a NLRB case was filed. The case is still going on. It is founded on Landrum-Griffen and has nothing to do with antitrust law (1232-4, 1530).

But it was expressly understood that there was no suspension of UMW's obligations under Paragraph A of PWC (664, 827-8, 1533). The JICC met occasionally until 1964. There is no instance revealed in the minutes of any violation of PWC by UMW (822-35).

However, it is evident the interruption in the work of the committee by Landrum-Griffen was having its effect in renewal of competition and rebelling of UMW members. On March 12, 1964, Fox of BCOA wrote the president of Island Creek Coal Company, largest southern company in SCPA:

> "Dear Jim: Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signators to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40-cent royalty has been discussed on many occasions with the United Mine Workers.
>
> "I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only to the coal companies, but to the United Mine Workers of America as well.

"It is most difficult to meet any demands made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands." (881)

Another provision against non-union or non-complying coal was inserted shortly after the above letter, by UMW-BCOA in the 1964 Amendment to the National contract. This was the "80¢ Welfare Clause" (1375, 1378). This provision reads:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory hereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition." (410, 836)

Again there was a challenge of the inherent boycott of this clause under Landrum-Griffen. An NLRB case that is not concerned with antitrust law still goes on over the 80¢ Clause, UMW and BCOA contending for the legality of the clause (1232-3, 1527-30).

The 80¢ Clause was kept in the 1966 contract by UMW-BCOA, in spite of the NLRB case (1532-4). (In fact it was

kept in the 1968 contract, but that is de hors this record—see transcript page 2578).

We have commented above on the drastic unemployment and economic decline in many coal-producing areas. It remains to mention the effect of a decade of these national contracts on the industry as a whole.

By the year 1959, the operating loss of the entire corporate coal industry was $7,300,000 for that one year (420, 1515-6, 1966-7).

In contrast, Consol had net *profits after taxes* as follows:

1959	$20,523,000	
1960	19,064,000	
1961	22,824,000	
1962	24,358,000	
1963	28,569,000	
1964	33,278,000	
1965	41,167,000	(742)

Then in 1966 Consol became the first of the coal combines to be absorbed into an oil company to form the first of the so-called "energy companies."

ARGUMENT

A. THIS COURT HAS LAID TO REST ALL OF THE PRINCIPAL ARGUMENTS OF THE PETITIONERS IN ITS DECISIONS IN *ALLEN BRADLEY CO. v. LOCAL UNION*, 325 U.S. 797, *UNITED MINE WORKERS v. PENNINGTON*, 381 U.S. 657, AND *RAMSEY v. UNITED MINE WORKERS*, NO. 88, OCTOBER TERM, 1970.

All of the arguments and questions raised by petitioners other than the ones dealing with matters of procedure have been answered decisively and contrary to the contentions of petitioners in the majority opinions of this Court in *Allen Bradley Co. v. Local Union*, 325 U.S. 797, *United Mine Workers v. Pennington*, 381 U.S. 657, and *Ramsey v. United Mine Workers*, No. 88, October Term, 1970.

B. QUESTION NO. 1 RAISED BY UMW IS WRONG IN ASSERTING THAT THE JURY WAS ALLOWED TO FIND LIABILITY ON THE BASIS OF AN AGREEMENT BY THE UNION WITH ONE GROUP OF EMPLOYERS TO IMPOSE WAGE TERMS ON COMPETING COMPANIES WITHOUT A SPECIFIC FINDING THAT THE ARRANGEMENT WAS DELIBERATELY MADE AFTER A MEETING OF MINDS TO DRIVE THE COMPETITORS OUT OF BUSINESS.

UMW's question number one (and also its statement of the case at page 9) asserts that the jury was allowed to consider two theories of liability. The contention of UMW is that the jury was permitted to find the defendants liable (1) on a UMW-BCOA agreement to impose wage terms on other units, and (2) on predatory conspiracy.

The only language in the jury charge that UMW refers to in order to establish that the jury was allowed to find

liability on the first theory (no predatory conspiracy) is that part of the charge wherein the Court instructed the jury on the rights and exemptions of labor unions under the labor law. The Court charged these labor law rights fully. But the Court concluded this part of the charge with the limitations under labor law on the union's rights and exemptions. Thus, under labor law (as recited in *Pennington*) the union has a duty to bargain unit by unit and is not free to bargain with one unit about labor terms for other units; the union should retain the ability to respond in each unit without being strait-jacketed by some prior agreement with favored employers and if it does so, it loses its exemption. It is this language that UMW relies on in its first question.

But UMW does not point to any language in the charge that goes on to say that this conduct or this kind of strait-jacket agreement (without intentional, predatory, anticompetive conspiracy with business groups) makes the union and favored employers liable to a damaged competitor under antitrust law or in this case. There is no such language. The Trial Court refused plaintiff's request for such a charge.

The case at bar differs from prior cases concerning the conspiracy in that there was introduced here direct evidence in the form of minutes of association meetings, correspondence, and minutes of the Joint Industry Contract Committee showing clearly that the NBCWA was being used to knock out the coal being put into the markets by non-contract producers in order to bring about an upward spiral in wages and prices, with pressure from the coal associations that the union thus cooperate with the purposes of the major companies who dominated the associations. For instance see 836 in connection with 881 of the joint appendix; also 1655 in connection with 1661-3;

794-835. There was ample evidence in the case to establish an intentionally predatory anticompetitive conspiracy behind the course of conduct of the union and major associations with respect to the use of the NBCWA and its amendments to destroy competition.

The reason that the Trial Court refused the plaintiff's request for an instruction under which the jury could have found liability on an agreement by UMW with one set of employers to impose wage terms on other employers without predatory intent was because of the timing of this trial in the history of the development of these cases concerning combinations of union and business groups.

In *Allen Bradley* this Court held (325 U.S. 809-810):

"But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

" ... For if business groups by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves ....

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, depending upon whether the union acts alone or in combination with business groups."

In *Pennington* this Court held:

"One group of employers may not conspire to eliminate competitors from the industry and the union is

liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. 665-6)

This Court went on to consider in the *Pennington* case the legal effect of a particular type of agreement which it was contended had been made between the union and business groups, and this Court said at 381 U.S. 668:

"From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy."

After the remand, in *Second Pennington* the plaintiffs there attempted to show both an intentionally predatory conspiracy to eliminate competition back behind the use of the national contract and also that the specific type of agreement had been made by the union which put it in a strait-jacket with respect to bargaining with those plaintiffs and that this would violate antitrust policy without regard to the purpose or effect of that type of agreement, when it actually had destroyed the business of the plaintiffs. On the appeal of that case, the Sixth Circuit said that the plaintiffs' theory in this type of case must be confined to a predatory conspiracy to drive competitors out of business. 400 F.2d at 814-5. The Supreme Court denied certiorari in *Second Pennington*, 393 U.S. 983.

It was at this point that the case at bar was tried and the Trial Court was confronted with the restriction upon theories contained in *Second Pennington*. For this reason the single theory presented here was the intentionally predatory conspiracy behind the use of the NBCWA.

It was after the trial in this case that this Court cleared up the law on the question left after the Sixth Circuit's opinion in *Second Pennington* with respect to the legal effect of the strait-jacket type of agreement if an intentionally predatory conspiracy back behind such an agreement was not proved.

But in this case the Trial Court carefully confined the issue on liability to the intentionally predatory conspiracy. There simply is no room to have confusion upon this when the charge on liability was to the following effect:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff." (1838)
>
> "The South-East Coal Company claims that it has been injured and thereby damaged by the unlawful joint acts of the defendants, United Mine Workers of America and the Consolidation Coal Company. This alleged wrongful action is that the two defendants had been guilty of a conspiracy against the plaintiff.

"A conspiracy is an arrangement or an agreement or plan between two or more individuals or, as in this case, corporate entities, to commit an unlawful act, or to commit a lawful act, in an unlawful way.

"In other words, the plaintiff claims that this coal company, through its officers and agents, had a plan or an agreement, the officers and agents of the labor union, to require all coal producers in Eastern Kentucky coal fields to execute a contract with the United Mine Workers ...." (1843-4)

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of business, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants." (1844)

"In other words, it is claimed by the plaintiff the defendants fixed the wages and Welfare Fund royalties so high in 1950 by the National Bituminous Coal Wage Agreement and the amendments thereto that the small companies, including this plaintiff, could not pay them and continue to operate successfully. And that the defendants knew that the small companies, including the plaintiff, could not pay the fixed wages and Welfare

Fund royalties, and that thereby the trade and competition offered by the small companies, including the plaintiff, to the larger coal producing companies, including the defendant Consolidation Coal Company, would be eliminated by putting the small companies, including the plaintiff, out of business.

"It is for you to determine from all the evidence and all reasonable inferences which may be drawn from the evidence whether or not these defendants had such an agreement or meeting of the minds for the intent and purpose of unreasonably restraining trade and monopolizing the coal industry in the eastern Kentucky locality by driving the small companies, including the plaintiff, out of business.

"You are instructed that the execution of the written contract is not of itself or per se a violation of the law.

"In order for the contract to be unlawful you must believe that its execution by the defendants was for the purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff." (1845-6)

It is to this kind of conspiracy that the language of the Court of Appeals (referred to at pages 10-11 of UMW's petition) is directed. This kind of conspiracy was held to violate the Sherman Act in both *Allen Bradley* and *Pennington*. It is a violation whether or not it is called "per se" or "because of predatory intent" or whatever.

C. UMW'S SECOND QUESTION AND CONSOL'S SECOND QUESTION ARE WRONG IN CONTENDING THAT THE JURY WAS CHARGED IT COULD FIND LIABILITY WITHOUT FINDING AN INTENTIONALLY PREDATORY CONSPIRACY.

We submit that such parts of the charge as we have quoted just above demonstrate the incorrectness of the contentions made in the second questions of each of the petitions. The jury was clearly told that if there was no intentionally predatory conspiracy behind the use of the national contracts the finding must be for the defendants.

The point made by UMW's second question seems to be boiled down to the last paragraph at page 25:

> "Without some analysis from the judge of how the contract's provisions could have operated within the bargaining unit to injure competition, or some requirement that they find an additional agreement to impose its terms outside the bargaining unit, the jury was left at large to impose liability on the basis of a dislike of the union's motives, a result which the labor exemption was expressly designed to prevent."

We submit that this contention has no practical application in fact to the issue presented and found by the jury as illustrated by the quotations above from the charge.

Consol, at page 13-18 of its petition and dealing with its second question, picks language out of context from the charge of the District Court and opinion of the Court of Appeals to make it appear that the jury was permitted to decide the basic question of liability solely upon the parallel course of conduct of signatories to the NCBWA, and Consol contends that the jury was allowed "to conclude that 'having in mind' or having 'conscious knowledge' that

a legal agreement could harm a competitor was the equivalent of actual agreement" (Consol petition, page 13).

Even if Consol's analysis of the charge were correct, Consol would be faced with the holding in *Interstate Circuit v. United States*, 306 U.S. 208, 227:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States*, 253 F. 212, 213, affd, 249 U.S. 47, [63 L. Ed. 470, 39 S. Ct. 247]; *Levey v. United States*, 92 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

But the very language used here by Consol, when put back into context, means the jury had to determine the purposes of the petitioners, their actual intent, with respect to whether the NBCWA would "deliberately" and with "agreement or meeting of minds" be *used* to drive competitors out of the markets so the defendants would profit.

As stated, Consol merely takes isolated words out of context and does not discuss at all the main part of the charge with respect to the principal issue submitted to the jury. Petitioners make no reference to such parts of the charge as we have quoted above.

The isolated language chosen and relied upon by petitioners from the charge to the jury and the opinion of the Court of Appeals should be put back in context and taken in conjunction with the foregoing main part of the charge

with respect to the issue of liability. The issue sought to be raised under this question by petitioners is unreal and not related to the full import and meaning of the charge.

D. UMW'S FIRST QUESTION AND CONSOL'S FIRST QUESTION ARE WRONG IN CONTENDING THAT AN INTENTIONALLY PREDATORY CONSPIRACY BETWEEN A UNION AND BUSINESS GROUPS TO DESTROY COMPETITION MAY MERELY FORFEIT ANTITRUST EXEMPTION WITHOUT ESTABLISHING LIABILITY TO AN INJURED COMPETITOR.

As shown above, the issue on liability presented to the jury was whether the defendants entered into an intentionally predatory conspiracy to destroy competition in the bituminous coal industry. Under the District Court charge, no other agreement, understanding or contract of any type would be sufficient to impose liability on the petitioners. In a decision which has stood for over 25 years without change by the Congress, this Court held in *Allen Bradley* that such a predatory conspiracy, even though it involved a labor union, violated the Sherman Act and the defendants were liable therefor. The same rule was recognized in *Pennington*.

The District Court here refused to charge the jury that the defendants could be held liable for some other or different type of conspiracy or agreement, such as an agreement to impose certain wage terms on other bargaining units without specifically proving behind it a conspiracy and purpose to destroy the competitors in those units. All of the contentions and arguments raised by the petitioners concerning the latter type of agreement have absolutely nothing whatsoever to do with the actual jury finding in the case now at hand.

This kind of conspiracy violates the Sherman Act under the applicable decisions, and there remain no arguments, with respect to this type of conspiracy, that it can simply be held to result in a forfeiture of union exemption and not be a violation of the act for which the defendants are liable to a damaged competitor.

The petitioners have advanced no argument that would indicate that the obviously just and necessary rule in *Allen Bradley* should be changed after all these years when Congress has not chosen to change it.

E. THE RELIANCE BY CONSOL UNDER ITS THIRD QUESTION UPON THE *NOERR* AND *PENNINGTON* DOCTRINE PROTECTING THE RIGHT TO PETITION IS CLEARLY MISPLACED.

Under its third question, Consol relies on *Eastern Railroad Conference v. Noerr Motors*, 365 U.S. 127 and *United Mine Workers v. Pennington*, 381 U.S. 657. Consol says that the jury was charged that the labor contracts considered by themselves were lawful and then says on page 19 of its petition:

> "It is submitted that those cases (*Noerr* and *Pennington*) stand for the proposition that if an action is legal, then an anticompetitive intent or purpose will not make it illegal."

But clearly the doctrine of those cases was founded upon the constitutional right of citizens to petition their government representatives. There is nothing at all in a predatory conspiracy to use a labor union to drive competitors out of an industry (as distinguished from petitioning the secretary of labor to establish a prevailing wage under the Walsh-Healy Act as in *Pennington*) that is related in any fashion to the constitutional right to petition an individual's government representative.

Under ordinary antitrust law where constitutional rights are not thus involved, the long established rule is that which is stated in *American Tobacco Company v. United States*, 328 U.S. 781:

> "It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful."

and more specifically this Court said in *United States v. Reading Co.*, 226 U.S. 324, 357:

> "It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U.S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful."

And with particular reference to the kind of conspiracy charged here, this Court said in *United Mine Workers v. Pennington*:

> "One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers if it becomes a party to the conspiracy. This is true even though the Union's part in the scheme is an undertaking to secure the same

wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. 665-666)

F. CONSOL'S CONTENTION UNDER ITS QUESTION NO. 4 AND UMW'S CONTENTION UNDER ITS QUESTION NO. 3 THAT THE TRIAL COURT FAILED TO GIVE A CHARGE UNDER THE CLEAR PROOF RULE ADEQUATE TO PROTECT THE RIGHTS OF BOTH DEFENDANTS IS WITHOUT BASIS IN FACT. THE TRIAL COURT GAVE BOTH DEFENDANTS THE BENEFIT OF A GENEROUS INSTRUCTION UNDER THE CLEAR PROOF RULE OF THE KIND THEY THEMSELVES REQUESTED.

Predatory conspiracy was the illegal act charged in this case.

The District Court charged the jury " ... such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (1836)

The Court finished off charging the jury what clear proof means at a place in the charge where there can be no doubt that it had greater impact than if it had been buried in the charge. Shortly before the jury was sent to deliberate the Court left defendants' own version of clear proof strong and fresh in the minds of the jury as follows:

"Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof." (1915)

The foregoing charge is essentially the charge on clear proof that was invited by the defendants (1755, Consol's request No. 28; 1741, UMW's request No. 16). It extends beyond the requirements of the majority opinion of this Court in *Ramsey*. We submit it also satisfies the minority opinion in *Ramsey*.

If the Court will recall, in *Ramsey*, UMW has argued that where a union was a defendant all elements of the alleged agreement or conspiracy itself must be proved by clear proof (as it had successfully argued in *Second Pennington*), but after this Court granted certiorari in *Ramsey*, and realizing the weakness of its previous successful arguments along this line, UMW switched to the contention that Section 6 really was limited to proving authorization, ratification or participation in acts of agents; but that the Trial Court in *Ramsey* had actually so limited the rule.

Petitioners yet again raise this matter of the clear proof rule, but we submit that the foregoing portions of the charge of the Court to the jury adequately protected both the defendants exactly in the way they were seeking to be protected.

Realistically, and referring to our Statement of Facts above, we submit that it would truly be impossible to pick out any of the acts of agents in this case which was not clearly authorized by the respective principals.

The language in the Court of Appeals opinion concerning the clear proof rule was aimed at the arguments which existed before UMW switched its contentions with respect to clear proof in the *Ramsey* case. In cases before *Ramsey*, UMW's argument was not aimed primarily at specific language in Section 6, but was more related to the exemption provided unions under antitrust statutes when they act alone. UMW had urged that when a union was involved as a defendant in an antitrust case, a new standard of proof

should be fashioned for determining the issues of liability. But this Court rejects such contentions in *Ramsey* saying:

> "Nor do we discern any basis for ourselves fashioning a new standard of proof applicable in antitrust actions against labor unions."

In similar fashion and with considerable elaboration of its reasoning, the Court of Appeals reaches the same result that simply because a union is involved does not mean that the Court should fashion a new rule of liability in antitrust conspiracies, over and beyond the language of Section 6.

But the fundamental question of whether or not the charge to the jury adequately protected the defendants must be answered in the affirmative as shown from the foregoing quoted portions of the charge.

This Court has decisively and clearly resolved all questions concerning the meaning and extent of the clear proof rule in *Ramsey* and prior cases, and it would serve no purpose to review this question again at this time.

G. THE COURT OF APPEALS HAD CORRECTLY AND FULLY ANSWERED ALL OF THE CONTENTIONS RAISED BY THE FIFTH QUESTION IN CONSOL'S PETITION AND THE FOURTH QUESTION IN UMW'S PETITION CONCERNING ALLEGED IRREGULARITY IN PROCEDURE IN THE DISTRICT COURT.

The petitioners insert a conglomeration of questions concerning procedural matters in this case all of which were fully answered by the Court of Appeals.

1. It Was Not Error to Allow Proof of the Effects of Defendants' Conduct.

Under Consol's first point under its fifth question, it asserts that the trial developed into a contest "between the populus of Eastern Kentucky on the one hand, and UMWA and petitioner on the other." There *was* considerable presentation of the effects and consequences of the defendants' course of conduct which clearly was creating distress to the Appalachian coal mining communities, such as those in Eastern Kentucky. But this kind of evidence is necessary in this case as in any other antitrust case.

In this case the plaintiff relied on both direct proof of conspiracy and circumstantial evidence based largely on the effects and consequences of the course of conduct of the defendants. The Supreme Court warned in *United Mine Workers v. Pennington*, *supra*, that in this type of case the circumstantial evidence would have to extend beyond merely showing that the defendants suspected that the weakest units of the industry could not conform with the national contract labor terms. The effects and consequences would have to be more radical than that. The proof in this case did go beyond those limited conditions, both from the national viewpoint and with respect to Eastern Kentucky.

In addition, it is to be recalled that proof of public injury in a Sherman Act case was, up to very recently, not only permissible but was mandatory. Even today many courts require such proof in a case not based on a per se violation, although such public injury "need not be nationwide in geographical scope" (see *Reliable Volkswagon S & S Company v. World Wide Auto Corp.*, 182 F. Supp. 412, 425-6; *Continental Ore Company v. Union Carbide Corp.*, 370 U.S. 690, 708). Plaintiff complied with this requirement also particularly showing the resulting situation in Eastern Kentucky.

Also, we submit that all of this proof was admissible in the face of the contentions of the defendants. Proof that UMW's course of conduct was benefiting Consol to the extreme and restraining, on the other hand, the trade and commerce and competition of great areas of the coal industry was certainly pertinent to the defense that the union's conduct was unilateral, not to benefit Consol. Similarly, proof as to the effect on vast unemployment of union members, both nationally and in Eastern Kentucky was pertinent when UMW's principal defense was that it was acting unilaterally for union purposes alone to benefit union members.

In the face of such contentions by the defendants, it was inevitable and absolutely necessary that the plaintiff submit this type of proof in presenting its evidence of a predatory conspiracy to destroy competition in the bituminous coal industry.

2. The Defendants Were Protected as to Alleged Hearsay Evidence.

The second point raised under the fifth question at page 23 of the Consol petition deals with the alleged failure of the District Court to charge the jury as to certain hearsay evidence (evidence which was actually taken in regular discovery interrogatories from the official records of one of the defendants). The Court of Appeals very adequately and fully answered this contention in its opinion under the heading "E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements."

It is also to be observed in this connection that during the course of the trial, the District Court very fully and repeatedly charged the jury, as this evidence was presented, the full protections that a defendant is entitled to as to such evidence, and this was to the complete satisfaction of both defendants (376-8, 423-4, 430, 880, 1525).

3. The Jury Charge Was Proper Without Including the "Equal Hypothesis Rule."

The third contention under Consol's fifth question at page 23 of its petition concerns the alleged failure of the Court to charge the jury as to the so-called "equal hypothesis rule." The Court of Appeals has very fully answered this contention in its opinion under the heading "D. Equal Hypothesis Rule," under the part of the opinion dealing with alleged errors in instructions.

4. The Evidence Was Sufficient to Support the Verdict.

Under the fourth contention made under the fifth question raised by Consol at page 24 of its petition, the petitioners question the sufficiency of the evidence by pointing to the District Court's denial of motions for directed verdict and motions for judgment n.o.v. based on that ground. However, it is submitted that our statement of the facts, supra, shows quite clearly that there can be no question in this case that there was ample and sufficient evidence to support the jury verdict of liability.

5. There Were No Irregularities Pertaining to the Jury That Prejudiced the Defendants.

The fifth contention made by Consol under its fifth question at pages 24 and 25 of its petition and the fourth question raised by the UMW petition relate to alleged irregularities concerning the jury in the course of the trial. *The record shows that UMW's statement of these matters in its petition implies irregularity that did not exist.* The Court of Appeals (as well as the District Court) has very fully answered these contentions and has shown that they are not substantial grounds of complaint and certainly

could not be prejudicial, treating these matters in the third main part of its opinion under the heading "Alleged Irregularities with Respect to the Jury."

6. The Jury Charge Was Not Generally Inadequate or Prejudicial.

The final contention made by Consol under its fifth question at page 25 of its petition is that the charge generally was inadequate, confusing and prejudicial. We submit that this is an incorrect analysis of the charge of the Court in this case. We think that the trial court here did an excellent job in conveying to the jury the nature of the issues that it was supposed to decide. This jury was not a group of lawyers or economic experts, but 12 citizens made up of a broad cross-section of all of the communities of Eastern Kentucky. The defendants had demanded that the Court select the jury, not just from the local division, but from all divisions of Eastern Kentucky (much of which was not in the coal mining area) running from Tennessee to Ohio and from the middle part of the state to Virginia, and the Court granted this wish (33, 36). The Court was talking to this broad cross-section of people about a long and complex trial when he gave the charge.

Before giving the charge and during the course of the trial in colloquies with counsel outside the presence of the jury, the Trial Judge showed his concern that the jury clearly understand the questions it was to decide. His strongly expressed feeling was that it would be unfair to both sides if the issues were not stated simply and clearly and if jurors became confused by a morass of meticulous and argumentative instructions. He made this very plain to counsel. The Learned Trial Judge has had considerable experience on the bench and in long, complex cases and

knows the confusion in which the jury is apt to be left by long-winded charges. His comment was:

> "My idea about these instructions, you can just over-instruct a jury. This is a complicated matter and I can narrow it down and give a sharp issue to them to decide—it is easy to get confused on many things in a long case." (1526-7)

The Court later was disappointed that he did not get too much help from counsel on their suggested instructions in keeping the issues clear. He was particularly disappointed that the requests of the defendants would have the Court argue defendants' case to the jury and would leave the jury in a fog (1584-6). He said again:

> "I do want to impress upon you the idea which I believe is imperative in this case—to try and draw a sharp issue for the jury to decide, and not have them go out there into the jury room in such a maze or quandry that they feel like they are not competent to decide the case—because they are, and the issue is sharp." (1589-90)

Subsequently, the Court advised counsel the nature of the charge the Court intended to give including the issue to be answered by the jury (1690-7). This was substantially the charge given the jury, except for some preliminary explanations given the jury.

Considering the help (or lack thereof) given in the requested charges we believe the Court has done the best job possible in presenting the case in form that would be valid and legal without giving the extreme overstatements of defendants' case insisted upon by defendants (1736-1766). Defendants criticized and objected to every effort of the Court to state the case without themselves coming up with

requests that would be correct, fair, clear, concise *and relevant to the single theory of predatory conspiracy presented to the jury*.

The question here is whether the charge *considered as a whole* was fair and adequate without substantial prejudice to defendants. Flaws can be found in almost any charge by separating certain paragraphs from the whole. Thus, the charge must be considered as a whole to determine whether it gave the jury a correct understanding of the propositions which they are to decide and the pertinent principles of law which shall guide them in their decision. See the numerous cases at Vol. 49, *Federal Practice Digest*, Trials, Section 295(1).

CONCLUSION

For the foregoing reasons, respondent submits that the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

C. GIBSON DOWNING,
Stoll, Keenon & Park,
310 First National Bank Building,
Lexington, Kentucky,

JOHN A. ROWNTREE,
Fowler, Rowntree, Fowler & Robertson,
1412 Hamilton Bank Building,
Knoxville, Tennessee,

Attorneys for Respondent, South-East Coal Company.